Supreme Court, U.S.
FILED

94 786 OCT 7 1994

OFFICE OF THE CLERK

No. 94-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

NEVADA ENTERTAINMENT INDUSTRIES, INC.,
a Nevada corporation and DANIEL BISHOP
Petitioners,
vs.
CITY OF HENDERSON, a Nevada Municipal corporation,
JAMES GOFF, CHIEF OF POLICE OF THE CITY OF
HENDERSON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROGER JON DIAMOND, ESQ.
2115 Main Street
Santa Monica, California 90405
(310) 399-3259
Attorney for Petitioners

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

50 pp

QUESTIONS PRESENTED

1. May a city violate the First and Fourteenth Amendments (free speech) by shutting down an adult bookstore pursuant to an unconstitutional *zoning ordinance* because the bookstore obtained its *business license* by deception?

2. Is an adult bookstore without constitutional protection vis-a-vis an invalid zoning ordinance because it obtained its business license by deception?

3. To prove that a city utilizes an unconstitutional zoning scheme to ban all adult bookstores, may an adult bookstore employ deception in obtaining a business license?

4. Do this Court's decisions in the *criminal* cases of *Bryson v. United States*, 396 U.S. 64, 90 S.Ct. 355 (1969), *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840 (1966); and *Kay v. United States*, 303 U.S. 1, 58 S.Ct. 468 (1938), apply to civil cases involving constitutional challenges to invalid ordinances which violate the First and Fourteenth Amendments (free speech)?

PARTIES TO PROCEEDING

Nevada Entertainment Industries, Inc. is a Nevada corporation. There is no parent company and there is no subsidiary.

Daniel Bishop is an officer of Nevada Entertainment Industries, Inc.

The City of Henderson is a Nevada municipality. James Goff is its Police Chief.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS	4
STATEMENT OF THE CASE	4
ARGUMENT	9
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

Page

Acanfora v. Board of Education, 491 F.2d 498 (4th Cir.) *cert.den.* 419 U.S. 836, 42 L.Ed.2d 63, 95 S.Ct. 64 ..... 7, 12

Bryson v. United States, 396 U.S. 64, 90 S.Ct. 355 (1969) 7, 9, 10, 11

Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840 (1966) 7, 9, 10, 11

Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993) 12, 13

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 107 L.Ed.2d 603, 110 S.Ct. 596 (1990) 5

Kay v. United States, 303 U.S. 1, 58 S.Ct. 468 (1938) 7, 9, 10, 11

Schneider v. State, 308 U.S. 147, 84 L.Ed.2d 155, 60 S.Ct. 146 (1938) 5

Staub v. City of Baxley, 355 U.S. 313, 2 L.Ed.2d 302, 78 S.Ct. 277 (1958) 5

No. 94-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

NEVADA ENTERTAINMENT INDUSTRIES, INC.,
a Nevada corporation and DANIEL BISHOP
Petitioners,
VS.
CITY OF HENDERSON, a Nevada Municipal corporation,
JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States District Court for the District of Nevada was signed on November 25, 1992 by the Honorable Lloyd D. George, United States District Judge and entered on November 27, 1992. The decision was not reported or published. It is Appendix 1 to this Petition.

The initial decision of the Court of Appeals was published as *Nevada Entertainment Industries v. City of Henderson,* 8

F.d 3d 1348 (9th Cir. 1993), but was withdrawn by an order published at 21 F.3d 895 (1994).

On May 4, 1994, the United States Court of Appeals for the Ninth Circuit filed its new decision in this case. It did so by a Memorandum that was not published. A copy of the Court of Appeals' unpublished Memorandum Decision filed May 4, 1994 is Appendix 2. The order denying rehearing filed July 11, 1994 is Appendix 3.

During the course of these proceedings there have been related orders made by this Court in response to Petitions filed by the City of Henderson which challenged federal jurisdiction on abstention grounds. None of these orders is directly related to the instant Petition. While the instant case was still pending in the District Court, the City of Henderson sought a Writ of Mandate from the Court of Appeals, which was denied. This Court denied a Writ of Certiorari in *City of Henderson v. United States District Court*, U.S. ____, 112 S.Ct. 60 (1991) and also denied a Petition for Rehearing, ____ U.S. ____, 112 S.Ct. 622 (1992). This case bore docket number 90-1771.

Later, the City of Henderson challenged the refusal by the United States Court of Appeals for the Ninth Circuit to allow an interlocutory appeal, This Court denied relief. See *City of Henderson v. United States District Court*, ____ U.S. ____, 113 S.Ct. 657 (1992). This case bore docket number 92-643.

Still later, the City of Henderson filed a Petition for Writ of Mandamus with this Court to challenge the order of the United States Court of Appeals for the Ninth Circuit withdrawing its prior opinion in this matter. See *City of Henderson v. Nevada Entertainment Industries*, No. 93-1969. This Court denied the Petition on October 3, 1994.

JURISDICTION

Petitioners are seeking review of the unpublished Memorandum Decision of the United States Court of Appeals for the Ninth Circuit filed May 4, 1994. Appendix 2.

On July 11, 1994, the United States Court of Appeal for the Ninth Circuit denied the Petition for Rehearing filed by Petitioners Nevada Entertainment Industries and Daniel Bishop. Appendix 3.

This Court has certiorari jurisdiction by virtue of Title 28, United States Code, Section 1257 because Petitioners are claiming a right "under the Constitution . . . of . . . the United States."

This Petition is timely because Rule 13 of this Court allows a Petition for Writ of Certiorari to be filed within 90 days after the denial of a Petition for Rehearing. In this particular case the Court of Appeals denied the Rehearing Petition on July 11, 1994. Thus, this Petition is timely because it was initially postmarked October 7, 1994 and received on Tuesday, October 11, 1994 (Monday was a holiday).

Respondents have again filed their own Petition for Writ of Certiorari in this matter. *City of Henderson v. Nevada Entertainment Industries*, No. 94-662. The instant Petition is not to be considered a cross petition, but both seek review of the same decision below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in part, as follows:

> "Congress shall make no law . . . abridging the freedom of speech."

The Fourteenth Amendment to the United States Constitution provides, in part, as follows:

> "... No state shall ... deprive any person of life, liberty, or property, without due process of law ...."

STATEMENT OF THE CASE

Petitioners Nevada Entertainment Industries, Inc. and Daniel Bishop (hereinafter "Nevada Entertainment") initiated this proceeding in the United States District Court for the District of Nevada under the Federal Civil Rights Act, Title 42, United States Code Section 1983 to enjoin the City of Henderson and its Chief of Police (Respondents, hereinafter referred to as "City of Henderson") from enforcing certain unconstitutional ordinances. Nevada Entertainment was operating a retail business that sold sexually explicit but constitutionally protected books, magazines, and video tapes. Nevada Entertainment also exhibited sexually explicit but constitutionally protected video tapes at its premises in Henderson, Nevada. Nevada Entertainment also sought a declaratory judgment that certain provisions of the Henderson Municipal Code were constitutionally invalid.

Essentially Nevada Entertainment contended in the District Court that the regulatory scheme of the City of Henderson was invalid because its ordinances gave too much discretion to City Officials to decide whether a business such as the one being operated by Nevada Entertainment could operate. Nevada Entertainment relied on such

cases as *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 107 L.Ed.2d 603, 110 S.Ct. 596 (1990); *Staub v. City of Baxley*, 355 U.S. 313, 2 L.Ed.2d 302, 78 S.Ct. 277 (1958); *Schneider v. State*, 308 U.S. 147, 84 L.Ed.2d 155, 60 S.Ct. 146 (1938).

The action was filed after the City of Henderson had decided to revoke Nevada Entertainment's business license on the ground that it fraudulently obtained a business license from the City by misrepresenting to the City the nature of the business it intended to operate in the City of Henderson. Instead of seeking judicial review in the Nevada State Court of the revocation order, Nevada Entertainment filed the instant independent action in the federal court challenging the constitutionality of the ordinances themselves.

On May 30, 1990, the City of Henderson filed its answer to Nevada Entertainment's federal civil rights complaint. The City of Henderson pleaded no affirmative defenses in its answer.

On June 5, 1990, the District Court granted a preliminary injunction in favor of Nevada Entertainment. The basis for the preliminary injunction granted by the District Court was the likelihood that the Court would find the ordinances in question to be unconstitutional.

Although Nevada Entertainment also challenged the propriety of the City of Henderson's revocation of its business license and alleged, in connection with that challenge, that it did not obtain its business license by deception, Nevada Entertainment primarily attacked the constitutionality of the ordinances themselves and did not pursue its claim that the City of Henderson erroneously concluded it had been deceptive.

The case was tried to the District Court on the basis of the administrative record and other documents. The parties

filed trial briefs. Nevada Entertainment contended that the ordinances were unconstitutional and the City of Henderson contended the District Court lacked jurisdiction because of the abstention doctrine. At no time did the City of Henderson ever contend either it its Answer to the Complaint or in its trial brief that Nevada Entertainment's action should be dismissed for lack of clean hands. The Clean Hands Doctrine was never invoked by the City of Henderson in its Answer to the Complaint or in its trial brief.

Notwithstanding the fact that neither side argued the clean hands issue, the District Court rendered its decision on that basis, finding that Nevada Entertainment is precluded from challenging the constitutionality of the ordinances by virtue of having "unclean hands." The District Court, indeed, acknowledged the fact that neither side argued this point in footnote 1 of its Decision where the District Court stated:

> "The Court is disturbed by the failure of both parties to cite any authority on the fundamental and critical issue of whether Plaintiffs' fraudulent application precluded a constitutional challenge of the underlying law. Plaintiffs contend the fraudulent statements are immaterial, but fail to offer any argument, or law, distinguishing the contrary controlling law.
>
> Equally distressing, however, is that the City's counsel failed to properly identify the issue or to cite the readily available controlling law."[1] (Appendix 1, p.6)

The District Court, on its own motion, then proceeded to rule that it would not decide the constitutionality of the

---

[1]Because the unclean hands issue was not pleaded, Nevada Entertainment entered into a stipulation that allowed the District Court to decide the case on the basis of a transcript of proceedings before the Henderson City Council and other matters. There was no evidentiary hearing before the District Court. No witnesses were called and there was no discovery.

ordinances because Nevada Entertainment was allegedly deceptive in obtaining its business license and therefore disqualified from obtaining a ruling on the merits.

The District Court cited this Court's criminal cases of *Bryson v. United States*, 396 U.S. 64, 90 S.Ct. 355 (1969); *Dennis v. United States*, 384 U.S. 855, 86 S.Ct. 1840 (1966); and *Kay v. United States*, 303 U.S. 1, 58 S.Ct. 468 (1938).

The District Court also relied upon the decision from the United States Court of Appeals for the Fourth Circuit in *Acanfora v. Board of Education*, 491 F.2d 498 (4th Cir.) *cert.den.* 419 U.S. 836 42 L.Ed.2d 63, 95 S.Ct. 64 (1974).

The United States Court of Appeals for the Ninth Circuit, after first filing an opinion regarding the abstention issue and later withdrawing it, affirmed the judgment of the District Court on May 4, 1994. The Court of Appeals acknowledged that the City of Henderson never pleaded the Clean Hands Doctrine as a defense nor asked that the case be dismissed on this ground. The Court of Appeals, however, felt that since Nevada Entertainment had pleaded that its conduct was not fraudulent and since the City of Henderson had denied that allegation in its answer that the issue was therefore presented for resolution by the District Court.

With respect to the alleged deception, the facts of this case established that Nevada Entertainment entered into a lease for certain property on February 17, 1989 at 1100 N. Boulder Highway, Henderson, Nevada. The property consisted of an improved building and a large parking area. At the time Nevada Entertainment intended to operate a business wherein sexually explicit materials would be sold and exhibited. At that time the City of Henderson did not extensively regulate such businesses because they did not exist in the City. At the time the property was properly zoned for such a use.

After Nevada Entertainment entered into a lease, the City on April 4, 1989 enacted a comprehensive revision of its zoning laws. Its new ordinance defined adult bookstores and arcades and limited them to a newly created CH zoned category. Although the City by ordinance adopted April 4, 1989 purported to restrict adult bookstores and arcades to the CH zone, no property at the time was zoned CH.

When Nevada Entertainment approached City officials in July or August of 1989 to inquire about a business license, Nevada Entertainment's representative answered in the affirmative when questioned by a City official as to whether or not the business was going to be an adult oriented type of business.

When a representative of Nevada Entertainment was advised that the City would not issue a business license to it because the City did not allow such businesses anywhere in the City, Nevada Entertainment submitted a new application which contained the following information under the heading "Occupancy Use Information:"

> "Mass media books and video store; novelty shop, etc. . . ."

When Nevada Entertainment opened its business on February 1, 1990 as an adult bookstore and arcade, the City of Henderson took action to revoke its business license on the ground of fraud in obtaining of the license. It was after a hearing before the City Council wherein the City Council revoked the business license for alleged fraud that Nevada Entertainment then filed the instant federal civil rights lawsuit attacking the constitutionality of the City of Henderson's business license, zoning, and conditional use permit ordinances.

The City of Henderson has not amended its unconstitutional ordinances, yet Nevada Entertainment is precluded in

perpetuity from challenging them because of its alleged deception.

ARGUMENT

Certiorari should be granted to allow this Court to determine whether this Court's three criminal cases (*Bryson, supra, Dennis, supra* and *Kay, supra*), which precluded a defendant in a criminal fraud case from challenging the constitutionality of the regulatory system, allow a District Court, on its own motion, to decline to rule on the constitutionality of certain ordinances because of alleged deception committed by the one challenging the ordinances.

In *Kay v. United States*, 303 U.S. 1, 58 S.Ct. 468 (1938), this Court determined that a defendant convicted of making a false application to the Homeowners' Loan Corporation, a federal agency, could not challenge her conviction on the ground that Congress had no authority to create the very agency to which the application was submitted. This Court stated at 303 U.S. 6,

> " . . . When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction."

The *Kay* case involved a criminal prosecution for the submission of false statements. The statute in question was not being challenged by one seeking to exercise a constitutional right. The First Amendment was not involved. It was a criminal case, not a civil case.

Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840 (1966) was also a criminal case. The defendants were convicted of filing false statements with the National Labor Relations Board to obtain certain benefits. This Court de-

clined to allow the defendants to challenge the constitutionality of the statute that required the statements to be submitted. This Court stated at page 865:

> "We need not reach this question, for petitioners are in no position to attack the constitutionality of Section 9(h). They were indicted for an alleged conspiracy, cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleges an effort to circumvent law and not to challenge it — a purported compliance with the statute designed to avoid the courts, not to invoke their jurisdiction."

Justices Douglas and Black dissented from this Court's ruling.

Finally, the last relevant criminal case decided by this Court on the subject is *Bryson v. United States*, 396 U.S. 64, 90 S.Ct. 355 (1969). *Bryson* involved a collateral attack upon an earlier judgment of conviction. The District Court had set aside the convictions, but the Ninth Circuit reversed, finding no significant differences between the case and this Court's decision in *Dennis*. The question in *Bryson* was the same as the question in *Dennis*, whether one who is convicted of submitting a false statement to the National Labor Relations Board can avoid the conviction by challenging the constitutionality of the statute. All three cases, *Kay*, *Bryson*, and *Dennis*, involved criminal convictions for submitting false statements to federal agencies. None of the cases involved a constitutional challenge to a local ordinance based on the First Amendment. None of these cases involved an attempt by a municipality to shut down an activity protected by the First Amendment. None of these three criminal cases involved censorship. None involved the dis-

qualification of a civil plaintiff from seeking federal relief. Nevada Entertainment is forever barred from obtaining federal relief against facially invalid ordinances because of alleged deception in the license application. Nevada Entertainment was not deceptive in its federal litigation.

In addition to these three criminal cases, the District Court and the United States Court of Appeals for the Ninth Circuit relied extensively upon a twenty year old decision by the United States Court of Appeals for the Fourth Circuit *Acanfora v. Board of Education*, 491 F.2d 498 (4th Cir. 1974), wherein a school teacher who deliberately withheld from his application for employment information relating to his homosexuality was precluded from maintaining a lawsuit filed for the purpose of recovering his teaching position. The District Court concluded in *Acanfora* that the school teacher could not invoke the Court's processes to obtain relief because of his own deception in concealing his homosexuality from the School Board. The District Court's decision was affirmed by the United States Court of Appeals for the Fourth Circuit which cited this Court's decision in *Kay v. United States.*

As far as Nevada Entertainment knows, *Acanfora v. Board of Education* is the only civil case that has followed this Court's criminal cases, *Bryson, Dennis* and *Kay*.

Nevada Entertainment respectfully submits that the District Court and the Court of Appeals unnecessarily followed *Acanfora*, which in turn was based upon this Court's three criminal cases. It does not appear that the Fourth Circuit has continued to adhere to its *Acanfora* decision.

Most recently, Shannon Faulkner decided to challenge the constitutionality of the practice and policy of The Citadel, a military school in South Carolina, which prohibits females from enrolling. Ms. Faulkner deliberately concealed from The Citadel the fact that she was a female. Her

conduct was described by Circuit Judge Hamilton in his dissenting opinion in *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993), wherein a majority affirmed the granting of a preliminary injunction by the District Court which allowed Ms. Faulkner to enroll in day classes pending a decision on the merits. Circuit Judge Hamilton pointed out in footnote 4 of his dissenting opinion the facts of her enrollment:

> "As a final point, it has been suggested that Faulkner's tactics in gaining admission to The Citadel, i.e., surreptitiously eliminating any reference to her gender on documents accompanying her application, violated The Citadel's strict code of honor. . . ."

After the Fourth Circuit's decision upholding the preliminary injunction was filed, the trial was conducted in the United States District Court for the District of South Carolina. Chief District Judge Houck rendered judgment for Shannon Faulkner, finding the practice of The Citadel in excluding females to be a violation of the Fourteenth Amendment. Chief Judge Houck made the following finding of fact in his decision:

> "Faulkner is a 19 year old female who is a resident and citizen of the State of South Carolina. Her home in Powdersville, South Carolina, where she attended Wren High School and was a 1993 honor graduate. In January 1993 Faulkner applied to be admitted to the Corps of Cadets at the Citadel. She was thereafter advised by Citadel officials that her application had been provisionally accepted and that full acceptance was contingent upon her completion of all high school courses and the submission of final high school transcripts and certain medical and drug testing information. On February 10, 1993, The Citadel wrote Faulkner a letter revoking its acceptance of her applica-

> tion and advising her that she would not be admitted to the Corps of Cadets because of her sex."

Faulkner v. Jones, ____ F.Supp. ____ (D.C.S. Car. 1994).

This Court should grant certiorari to decide whether or not its criminal cases are applicable to civil rights lawsuits brought by plaintiffs attacking the constitutionality of ordinances and the conduct of City officials in enforcing those ordinances. As far as Nevada Entertainment knows, this Court has never determined that the clean hands defense may be raised by the District Court on its own motion to deprive a civil rights plaintiff of the right to challenge the constitutionality of governmental conduct. With all due respect to the District Court and the Court of Appeals, this Court's criminal cases are distinguishable. There the defendants were being prosecuted for making fraudulent statements. They each faced one criminal prosecution. Here, Nevada Entertainment will forever be barred from the City of Henderson because of the existence of unconstitutional ordinances which it is precluded from attacking.

In the instant case Petitioners' conduct was no different than the conduct of Shannon Faulkner. How else could Shannon Faulker expose the discrimination practiced by The Citadel other than applying for admission without disclosing her gender. That was clearly deceptive but it was necessary in order to expose the discrimination practiced by The Citadel. Otherwise, had she truthfully disclosed her gender The Citadel would have rejected her for reasons other than her gender. Once The Citadel provisionally accepted her in the mistaken belief she was a male, it could not reject her for a pretextual reason. Also, it was important for Ms. Faulkner to actually enroll while she pursued her litigation.

Similarly Nevada Entertainment herein had to establish its right to do business free from unconstitutional ordinances. The Courts below wondered why Nevada Entertainment could not have challenged the initial rejection of its application. This question could have been asked of Ms. Faulkner. Why could she not have truthfully disclosed her gender and then sued? She would not have been successful because The Citadel would have denied her application for a pretextual reason. More important, she had to be enrolled as a student while she litigated. It is much more difficult to fight while on the outside.

With respect to an adult bookstore, a truthful application is frequently met with pretextual denials, *e.g.*, lack of parking. Moreover, it is financially impossible for most adult bookstores to afford to litigate if not actually operating. Very few, if any, bookstores can pursue years of litigation while not operating. Most cities maintain unconstitutional regulatory ordinances to keep adult bookstores out. The only viable way to challenge an unconstitutional ordinance is to litigate while operating.

The decision below ignores realty and also the constitutional requirements of standing and ripeness. There is no real case or controversy until the city threatens to shut down an existing bookstore.

Persons interested in opening adult bookstores cannot afford to go from city to city challenging invalid ordinances unless they can actually open and operate. If one were to challenge an ordinance first, without opening for business, the city would amend its ordinance to conform to the Court's ruling. In all likelihood, the amended ordinance would allow an adult bookstore at some other location, but not the one for which the application was made.

Many cities have done this. Cities throughout the United States are very cleverly excluding new adult bookstores by

maintaining unconstitutional licensing and zoning schemes that cannot be challenged without deception.[2]

There appears to be a conflict between what is occurring in the Fourth Circuit with Shannon Faulkner on the one hand and Nevada Entertainment in the Ninth Circuit on the other. This Court should grant certiorari to resolve the conflict and to decide whether its criminal cases are applicable to First Amendment challenges to unconstitutional ordinances.

---

[2]Nevada Entertainment of course, does not concede that it was deceptive. Unfortunately, both the District Court and the Court of Appeals have found against it on this issue. Therefore, rather than challenging those findings here Nevada Entertainment proceeds on the assumption that it was deceptive. In other words, assuming deception, the District Court should still have reached the constitutionality of the ordinances. Otherwise, Nevada Entertainment is an "outlaw." It can never get protection by the Court. The criminal cases, however, are different because the defendants will not continually be subjected to unconstitutional ordinances. Here Nevada Entertainment is forever barred from the protection of the federal courts. Clearly the "punishment" for practicing a little deception cannot be banishment from the judicial system. Now it is at the mercy of a hostile city free to enforce at will its patently unconstitutional ordinances. If the City wanted to punish Nevada Entertainment for the alleged deception perhaps the City could have done so. However, the City cannot forever bar Nevada Entertainment from operating within its jurisdiction by enforcing forever its clearly unconstitutional ordinances. Neither the District Court nor the Court of Appeals was willing to put any time limit on Nevada Entertainment's disqualification from seeking judicial relief. Thus, for all time it is banished from the judicial system. For this reason this Court's criminal should not be extended to civil rights cases.

CONCLUSION

For the foregoing reasons, Nevada Entertainment respectfully urge this Honorable Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Attorney for Petitioners

APPENDIX 1

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA IN **NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. V. CITY OF HENDERSON, ET AL.**, NO. CV-90-00264-LDG (LRL), ENTERED NOVEMBER 27, 1992.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Plaintiffs, v. CITY OF HENDERSON, et al., Defendants.	CV-S-90-264-LDG (LRL) DECISION [ENTERED NOV. 27, 1992 Clerk, U.S. Dist. of Nevada By _____Deputy]

The parties have submitted this matter for trial on the briefs. Plaintiffs seek a declaratory judgment that certain ordinances of the City of Henderson are unconstitutional and seek to enjoin enforcement of the ordinances.

Facts

On April 4, 1989, the City of Henderson enacted a new Zoning Code. Among its provisions, the Zoning Code limited the operation of adult businesses to a newly defined Commercial-Highway ("CH") zone. In implementing the Zoning Code, the City

roughly adapted its old zoning map but failed to create any CH zones. Further, the City failed to designate any CH zones until it adopted a new zoning map on December 4, 1989.

In the interim, plaintiffs applied for a business license to operate an adult business. In response to this application, plaintiffs were informed that an adult business could only be operated in a CH zone, that no CH zone existed, that they would have to obtain a zone change or variance, and that they would have to obtain a conditional use permit. Plaintiffs were also informed that, until they had met these conditions, their business license would not be authorized.

Plaintiffs' subsequently filed a new application for a license to operate a general business, omitting any reference to the adult nature of the business. The City approved this

second application in September. On February 1, 1990, plaintiffs opened an adult business. The City immediately commenced a revocation proceeding. In April, the City found that plaintiffs misrepresented the nature of their business on the application and revoked the license. Plaintiffs brought this action to stay the revocation, arguing that the various city ordinances are unconstitutional.

Lack of Jurisdiction

As an initial matter, the court notes that, contrary to the arguments of the City, the Younger abstention doctrine does not divest this court of jurisdiction. This doctrine "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced." Ohio

Civ. Rights Com'n v. Dayton Christian Schools, 477 U.S. 619, 626 (1986). The issue properly raised by Younger abstention is not whether this court lacks jurisdiction, but whether it should abstain from exercising its jurisdiction.

Abstention

This court is mindful of the principle that "abstention from the exercise of federal jurisdiction is the exception, not the rule." Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976). Federal courts are especially reluctant to abstain when First Amendment issues are involved. Baggett v. Bullitt, 377 U.S. 360, 379 (1964); Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 532 (9th Cir. 1984), rev'd on other grounds, 475 U.S. 14 (1986).

Previously, the City argued that

its action for declaratory judgment, brought in state court, compelled abstention. The City brought its state court suit four months after this court had entered a preliminary injunction in this federal action. "Younger abstention is required, however, only when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place.' Hicks v. Miranda, [422 U.S. 332, 349 (1975)]. In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238 (1984). This court affirms its prior ruling that the state court proceeding brought by the City did not compel abstention.

The City now argues that abstention is compelled by the City Council hearing and decision which

revoked plaintiffs' business license. This revocation proceeding, the City asserts, remains pending for Younger purposes. The City argues that "[s}tate proceedings...for which the state offers statutory appellate review through its courts or otherwise, are pending for Younger purposes from the time it is [sic] initiated, until it has [sic] completed the review process."

This court is not persuaded that the revocation proceedings remain pending for purposes of abstention. Not only must the state offer judicial review, but this review must permit review of the constitutional issues raised by the proceeding. The vital consideration guiding a determination of Younger abstention is comity: the federal government's proper respect for legitimate activities of state government. Huffman v. Pursue, Ltd.,

420 U.S. 592, 601 (1975).

Abstention accords the state judiciary the opportunity to oversee constitutional issues arising in litigation over which it has jurisdiction. Id., 420 U.S. at 609. Thus, "it is sufficient...that constitutional claims may be raised in state-court judicial review of the administrative proceeding." Ohio Civ. Rights Com'n v. Dayton Christian Schools, 477 U.S. 619, 629 (1986). Conversely, a proceeding which does not permit judicial review of constitutional claims is insufficient to compel abstention.

Although the City provides for judicial review of City Council determinations, this review is extremely limited. Pursuant to Henderson Municipal Code ("H.M.C.") Section 4.06.160, decisions of the City Council regarding business licenses may

be appealed to the state district court. This appeal is limited to a "judicial review of questions of law." This limited review is further narrowed to "the specific rulings on questions of law which the petition contends constitutes error." H.M.C. Section 4.06.160(a). Under this provision, petitioners can only appeal those questions of law for which the City Council has made a specific ruling. By not ruling on a constitutional issue, the City Council can preclude judicial review of that constitutional claim.

This is exemplified by the present case. Plaintiffs attempted to raise constitutional issues at the revocation hearing, although the City Council did not address any of these issues. At one point, Mayor Kesterson stated "I'm not trying the Constitution here and don't want to go into all that. We have a set case here that we are trying to

follow." Verbatim Transcript of License Revocation Hearing Held Before the City Council of Henderson ("V.T."), at 88 (April 10, 1990). Later, in apparent reference to the constitutional issues raised, Councilmember Williams remarked, "I really think that as far as we are concerned, some of [the] things that have been brought up are not in our prerogative to decide." V.T. at 244.

The City's order revoking plaintiffs' license reflects Mayor Kesterson's assertion that constitutional issues would not be decided. The specific rulings are expressly limited to believability of witnesses, the adult nature of the plaintiffs' business, and the finding that plaintiffs' misrepresented the nature of the business in obtaining a license. Since the City failed to make specific rulings on plaintiffs' constitutional questions, plaintiffs

are precluded from seeking judicial review of their constitutional claims. The lack of opportunity for plaintiffs' to pursue judicial review of constitutional claims indicates that the City Council hearing was not a pending state action for purposes of Younger abstention. Accordingly, because a state action was not pending when substantial proceedings occurred in this federal action, abstention is inappropriate.

Plaintiffs' Constitutional Challenge

Plaintiffs argue that the various provisions of the Henderson Municipal Code, as they existed when plaintiffs applied for a business license, were unconstitutional.[1] Without any support,

---

[1] The Court is disturbed by the failure of both parties to cite any authority on the fundamental and critical issue of whether plaintiffs' (Footnote Continued)

plaintiffs contend that, since the regulatory scheme was invalid, the statements they made on their license application are immaterial. This court disagrees.

Until the City Council hearing, plaintiffs had not sought to challenge the constitutionality of the provisions of the Henderson Municipal Code.

(Footnote Continued)
fraudulent application precluded a constitutional challenge of the underlying law. Plaintiffs contend the fraudulent statements are immaterial, but fail to offer any argument, or law, distinguishing the contrary controlling law.

Equally distressing, however, is that the City's counsel failed to properly identify the issue or to cite the readily available controlling law. At most, counsel made an unnecessarily circuitous argument that the fraudulent application precluded a federal challenge because "none of [the] ordinances were given an opportunity to be construed by the City and state court judiciary." This cursory argument is not only incorrect, but it ignores the opinions of the Supreme Court holding that plaintiffs cannot raise any constitutional challenge of a law that they have attempted to avoid by deception.

Rather, they attempted to circumvent the City's Code by filing a second, misleading application. A plaintiff may challenge a regulatory scheme without first submitting to the unconstitutional law. Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969); Fernandes v. Limmer, 663 F.2d 619, 625 (5th Cir. 1981). However, a plaintiff may not

> invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid. 'When one undertakes to . . . mislead [government officials] by false statements, he has no standing to assert that the operations of the Government in which the effort to . . . mislead is made are without constitutional sanction.'

Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1974), citing Kay v. United States, 303 U.S. 1, 6 (1938). In Dennis v. United States, 384 U.S. 855 (1966), the Court reiterated that a plaintiff who practices a course of fraud and falsehood in an attempt to circumvent a law, may not challenge the

constitutionality of the law when the deception is discovered. Whether a provision is constitutional or not is legally irrelevant to the validity of a finding that deception was used to avoid application of the law. Bryson v. United States, 396 U.S. 64, 68 (1969).

In the present case, plaintffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge

the law by opening and operating an adult business without obtaining any license.

Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected, submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As

permitted by H.M.C. section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license.

It is evident that plaintiffs attempted to avoid the City's zoning and licensing regulations through deception. Accordingly, plaintiffs cannot attack the revocation of their license, which was based upon the discovery of their deception, by challenging the constitutionality of the underlying law.

This decision shall constitute the findings of fact and conclusions of law. Judgment will be entered accordingly.

DATED this 25th day of November, 1992.

LLOYD D. GEORGE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Plaintiffs,	CV-S-90-264-LDG (LRL)
v.	JUDGMENT
CITY OF HENDERSON, et al., Defendants.	[ENTERED NOV. 27, 1992 Clerk, U.S. Dist. of Nevada By _____Deputy]

Judgment is hereby entered in favor of Defendants City of Henderson and James Goff, Chief of Police of the City of Henderson, and against Plaintiffs Nevada Entertainment Industries, Inc., and Daniel Bishop. The preliminary injunction entered by this court on June 5, 1990, is lifted. Pursuant to 42 U.S.C. Section 1988, the court may, in its discretion, award attorney's fees to the prevailing party. It is the court's determination that, although Defendants prevailed, their defense does not warrant an award of attorney's fees. Pursuant to Local

Rule 205, Defendants shall file a bill of costs and disbursements with the clerk.

DATED this 25th day of November 1992.

LLOYD D. GEORGE
United States District Judge

APPENDIX 2

MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN **NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. V. CITY OF HENDERSON, ET AL.**, NO. 92-17054 [DC # CV-90-00264-LDG Nevada (Las Vegas)], FILED MAY 4, 1994.

[Filed May 4, 1994; Cathy A. Catterson, Clerk, U.S. Court of Appeals]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation, et al.,	Nos. 92-17054 93-15052
Plaintiffs/ Appellants/ Cross-Appellees,	D.C. No. CV-90-00264-LDG
	MEMORANDUM*
CITY OF HENDERSON, a Nevada Municipal Corporation et al.	
Defendants/ Appellees/ Cross-Appellants.	

Appeal from the United States District Court for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted May 10, 1993

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

San Francisco, California

Before: BROWNING and CANBY, Circuit Judges, KELLEHER,** Senior District Judge.

Nevada Entertainment applied for a license to operate an adult video store in the City of Henderson, Nevada. Shortly before Nevada Entertainment filed its application, the City adopted a zoning code limiting adult businesses to Commercial Highway ("CH") zones. The City had no CH zones when the new code was adopted. The City told Nevada Entertainment it could operate an adult business only in a CH zone, and, since no such zone existed, it would have to apply for a zone change or variance as well as a conditional use permit. Instead, Nevada Entertainment filed a

---

**The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

new license application for a general rather than an adult video store. The City issued a license to operate a general video store. Nevada Entertainment then opened an adult video store.

The City commenced a proceeding before the City Council to revoke Nevada Entertainment's license because Nevada Entertainment had misrepresented the nature of the business it intended to open. After a hearing, the City Council issued an order revoking the license because of the misrepresentation in Nevada Entertainment's application. Rather than appealing this order to the state district court, Nevada Entertainment filed this action in federal court challenging the constitutionality of the zoning ordinances and seeking injunctive relief.

The City argued the district court was required to abstain under Younger v. Harris, 401 U.S. 37 (1971). The district court rejected the abstention claim but granted judgment for the City on the ground that under Dennis v. United States, 384 U.S. 855 (1966), Nevada Entertainment was barred from challenging the constitutionality of the zoning ordinances because it had obtained its license by fraud. Nevada Entertainment appealed. The City cross-appealed the court's refusal to abstain. We affirm the judgment of the district court on the basis of Dennis and dismiss the cross-appeal as moot.

I. NEVADA ENTERTAINMENT'S APPEAL

The district court properly declined to consider the constitutionality of the ordinances. "One who elects [to commit fraud] as a means of self-help may not escape the consequences by urging that his conduct

be excused because the statute which he sought to evade is unconsitutional." Dennis, 384 U.S. at 867; see also Ancafora v. Board of Educ. of Montgomery County, 491 F.2d 498 (4th Cir. 1974) (teacher could not challenge dismissal on the basis of discrimination where he was dismissed because he lied on his application). Nevada Entertainment's license was not revoked because of the nature of its business activity, but rather because Nevada Entertainment's application misrepresented the nature of its business.

Nevada Entertainment argues the district court should not have relied on Dennis because the issue of fraud was "never pleaded nor briefed." However, the federal complaint for declaratory and injunctive relief specifically alleged "[p]laintiffs made no material misrepresentations on their application," and the City's answer

denied the truth of this allegation. As the district court recognized, the City contended throughout the litigation that the constitutionality of the ordinances was not at issue since "the plaintiffs' ... license was revoked because of their own fraud, not because of the nature of their business." The stipulated record on which the case was tried in the district court included transcripts of the city council hearing, which was devoted exclusively to the issue of fraud. Nevada Entertainment had adequate notice that its fraudulent conduct was one of the issues in the case.

Nevada Entertainment also argues the administrative record is insufficient to support the district court's finding of fraud because there was no opportunity to present "affirmative evidence" to support the contention that it was "induced" to

falsify the license application. However, the testimony on which Nevada Entertaiment relies to support this inducement argument was in the record before the district court, and Nevada Entertainment does not point to any additional evidence in support of its argument or suggest it would have been barred from presenting such additional evidence to the city council. The district court's finding of deceptive co.duct is amply supported by the record.

Nevada Entertainment argues that even if its conduct were deceptive, the district court should have allowed some "deception" to permit Nevada Entertainment to position itself to challenge the constitutionality of the ordinances. Nevada Entertainment offers no reason why it could not simply have challenged the denial of the original

application rather than submitting a second, fraudulent application.

II. THE CITY'S CROSS-APPEAL

The City cross-appealed arguing Nevada Entertainment's entire action should have been dismissed under Younger. Since the City has prevailed in the district court and on appeal, any discussion of the City's argument would be advisory. See Lindquist v. Idaho State Bd. of Corrections, 776 F.2d 851, 853-54 (9th Cir. 1985). We decline to reach the abstention issue and dismiss the cross-appeal as moot.

The judgment of the district court if AFFIRMED. The City's cross-appeal is DISMISSED as moot.

APPENDIX 3

ORDER OF COURT OF APPEALS FOR THE NINTH CIRCUIT, IN CASE NO. 92-17054, 93-15052, DENYING THE PETITION FOR REHEARING OF NEVADA ENTERTAINMENT AND DENYING BOTH THE CITY OF HENDERSON'S MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING AND ITS MOTION FOR ORDER STAYING THE MANDATE.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,	)
Plaintiffs/Appellants/ Cross-Appellees,	)
v.	)
CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,	)
Defendants/Appellees/ Cross-Appellants.	)

Nos. 92-17054
93-15052

D.C. No. CV-90-00264-LDG

FILED

JUL 11, 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: BROWNING and CANBY, Circuit Judges, KELLEHER,* Senior District Judge.

* The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

Nevada Entertainment's Petition for Rehearing is DENIED. The City of Henderson's Motion for Leave to File a Second Petition for Rehearing is DENIED. The City of Henderson's Motion for Order Staying the Mandate is DENIED.